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In the Supreme Court of the United States

OCTOBER TERM, 1981

RAMAH NAVAJO SCHOOL BOARD, INC. AND LEMBKE CONSTRUCTION CO., INC., APPELLANTS

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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TABLE OF AUTHORITIES

Cases:	Page
Bryan v. *Itasca County*, 426 U.S. 373	2
Central Machinery Co. v. *Arizona Tax Commission*, 448 U S. 160	2, 3, 4, 5
Kansas Indians, The, 72 U.S. (5 Wall.) 737	1-2
McClanahan v. *Arizona State Tax Commission*, 411 U.S. 164	2
Mescalero Apache Tribe v. *O'Cheskey*, 625 F.2d 967, cert. denied, No. 80-812 (Feb. 23, 1981)	4
Moe v. *Salish & Kootenai Tribes*, 425 U.S. 463	2
Montana v. *United States*, No. 79-1128 (Mar. 24, 1981)	2
Thomas v. *Gay*, 169 U.S. 264	2
Tiffany Construction Co. v. *Bureau of Revenue*, 93 N.M. 593, 603 P.2d 332, vacated and remanded, 448 U.S. 902, judgment re-instated, 629 P.2d 1233, aff'd, 629 P.2d 1225, petition for cert. submitted Oct. 5, 1981, but not docketed because untimely	4
Utah & Northern Ry. v. *Fisher*, 116 U.S. 28	2
Warren Trading Post Co. v. *Arizona Tax Commission*, 380 U.S. 685	2, 5
Washington v. *Confederated Tribes*, 447 U.S. 134	1, 2
White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136	2, 3, 4, 5

Statutes:	
28 U.S.C. 1257(2)	5
28 U.S.C. 2103	5

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This memorandum is submitted in response to the Court's order of October 5, 1981, inviting the Solicitor General to state the views of the United States.

It is with reluctance that we urge the Court to grant review in another Indian case. We do so, however, because it seems apparent that both the state and federal courts require further guidance in the "vexing area" of State taxation of business activities within Indian Reservations. *Washington* v. *Confederated Tribes*, 447 U.S. 134, 138 (1980).

1. The decisions of this Court have definitively settled that both the Tribe and the individual members enjoy immunity from State taxes with respect to their lands, property, income or activities within the Reservation. *E.g.*, *The Kansas Indians*, 72 U.S.

(5 Wall.) 737 (1867); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973); *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 475-481 (1976); *Bryan* v. *Itasca County*, 426 U.S. 373 (1976); *Washington* v. *Confederated Tribes*, *supra*, 447 U.S. at 162-164. So, also, the Court has made clear that the State may tax non-Indian property, income or activities within a Reservation when there is only a tenuous and remote connection with tribal interests, or when the Reservation situs of the transaction is fortuitous. *E.g.*, *Utah & Northern Ry.* v. *Fisher*, 116 U.S. 28 (1885); *Thomas* v. *Gay*, 169 U.S. 264 (1898); *Moe* v. *Salish & Kootenai Tribes*, *supra*, 425 U.S. at 481-483; *Washington* v. *Confederated Tribes*, *supra*, 447 U.S. at 154-159. See, also, *Montana* v. *United States*, No. 79-1128 (Mar. 24, 1981), slip op. 18-21. On the other hand, the Court has held exempt from State taxation certain activities or transactions of non-Indians doing business with the Tribe within Reservation boundaries. *E.g.*, *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980); *Central Machinery Co.* v. *Arizona Tax Commission*, 448 U.S. 160 (1980). But the scope of this last rule has not been fully understood.

As we read *White Mountain Apache* and *Central Machinery*, the governing principles are these:

(a) The fact that the legal incidence of a State tax falls on non-Indians is not dispositive when the financial impact is on the Tribe;

(b) Federal law may pre-empt such taxation even though no treaty or statutory provision expressly addresses the question and even though there is not the plainly irreconcilable conflict between federal regulation and State taxation that alone would support a finding of preemption in a different context;

(c) Relevant considerations in determining whether State taxation is permissible include:

(1) The situs of the activity or transaction on the Reservation, at least if that situs is not fortuitous or contrived;

(2) The degree and continuing character of tribal involvement in the taxed activity or transaction;

(3) The importance of the tribal interests affected; and,

(4) The extent of federal regulation over the activity or transaction, mindful that it is the existence of the federal regulatory scheme, not its implementation in the specific instance, that matters.

2. We believe the New Mexico courts ignored these guidelines in the present case. At issue here was a substantial construction undertaking, necessarily occurring on the Reservation, wholly financed by specific congressional appropriations, closely regulated by federal law, involving a long continuing course of dealings between the contractor and a tribal agency, directly affecting the vital tribal concern with the education of its young members and implementing particularized congressional objectives. The economic burden of the tax was immediately passed on to a tribal governmental agency. On the other side of the balance, there was little more than the State's generalized interest in raising revenue. Accordingly, the case seems to us to be plainly within the principles announced by this Court in *White Mountain Apache* and *Central Machinery*.

Nor did the New Mexico Court of Appeals satisfactorily explain its reasons for holding those precedents inapplicable. Both the original opinion (J.S.

App. 27-34) and the opinion denying rehearing (J.S. App. 36-37) stress the legal incidence of the tax as falling on non-Indians as the dispositive consideration. *White Mountain Apache* is distinguished as involving timber harvesting and use of Bureau of Indian Affairs roads, activities subject to "pervasive" federal regulation (J.S. App. 36). But nothing is said of the comparable regulations governing Indian schools or their construction. And *Central Machinery* is confined to a holding construing the Indian trader statutes (*ibid.*), which is treated as wholly irrelevant where services, rather than goods, are sold, and different statutes are in play.

3. Regrettably, the present decision is not an isolated instance. If we focus only on like cases that have reached this Court in the past eighteen months, we find that the United States Court of Appeals for the Tenth Circuit has apparently failed to apply the teaching of *White Mountain Apache* and *Central Machinery* in deciding *Mescalero Apache Tribe* v. *O'Cheskey*, 625 F.2d 967 (1980), cert. denied, No. 80-812 (Feb. 23, 1981), and that the New Mexico courts have elsewhere similarly disregarded the controlling principles. *Tiffany Construction Co.* v. *Bureau of Revenue*, 93 N.M. 593, 603 P.2d 332 (Ct. App. 1979), vacated and remanded, 448 U.S. 902, judgment re-instated, 629 P.2d 1233 (Ct. App. 1980), aff'd, 629 P.2d 1225 (Sup. Ct. 1981), petition for cert. submitted Oct. 5, 1981, but not docketed because untimely. The upshot is that the lesson of *White Mountain Apache* and *Central Machinery Co.* has not been learned. Predictably, some courts will continue to distinguish those cases and decline to follow their teaching. Unless this Court now intervenes, it is likely that such precedents will accumulate and, in due course, will submerge the rule that non-Indian dealings with Tribes are, in many cir-

cumstances, exempt from State-imposed burdens. The issue may be of marginal significance to the other parties, but it is critically important to most Indian Tribes and to the national policy of promoting tribal self-sufficiency.

In different circumstances, it would be enough to vacate the judgment below and remand the case for further consideration. But the action of the New Mexico courts after such an order in the *Tiffany Construction* case indicates that a clearer mandate from this Court is necessary. Moreover, here, the New Mexico Court of Appeals, on a motion for rehearing, expressly considered and purported to distinguish *White Mountain Apache* and *Central Machinery* (J.S. App. 36-37), and the Supreme Court of New Mexico, having granted review (J.S. App. 38-40), later quashed its writ and declined to interfere (J.S. App. 41). In this situation, we urge the Court to note probable jurisdiction and finally to decide the controversy.[1]

Respectfully submitted.

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OCTOBER 1981

[1] The Court's actions in *Warren Trading Post, supra,* 380 U.S. at 686, and *Central Machinery, supra,* 448 U.S. at 163, indicate that review by appeal is proper under 28 U.S.C. 1257(2). But, of course, review by certiorari, as in *White Mountain Apache* and *Tiffany Construction,* is also available. See 28 U.S.C. 2103.

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